

November 2, 2016

VIA ECFS

EX PARTE NOTICE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Expanding Consumers' Video Navigation Choices, Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80

Dear Ms. Dortch,

On October 31, 2016, Angie Kronenberg and the undersigned counsel of INCOMPAS met with Marc Paul, Legal Advisor to Commissioner Rosenworcel, to discuss the Commission's rulemaking in the above-referenced proceeding.

INCOMPAS provided analysis of the Commission's authority to achieve the statutory purpose of Section 629 and bring competition to the market for video navigation devices. Generally, we explained that the statutory instruction in Section 629 specifically requires the Commission to adopt regulations that assure independent competition in this market from providers of devices and software that are not affiliated with an MVPD. Formulating such regulations requires the Commission to make the predictive judgments necessary to allow third-party device manufacturers to craft innovative navigation solutions that have functional parity with MVPD-provided devices. The aim of the Commission in this proceeding should be to allow third parties to bring competitive alternatives with an open and independent user interface to market. To be competitive they must offer the full set of features enjoyed by consumers today on devices they lease from their pay-TV provider. This will require MVPDs to provide metadata for the video content and exchange individual subscriber entitlement data. Any concern over the extent to which the *EchoStar* decision¹ curtails Commission authority under Section 629 can be allayed by the limited scope of that decision regarding direct broadcast satellite on the 2003 record. The requirement for the Commission to act today to fulfill the Section 629 mandate is supported by the extensive record in this proceeding, which over the last decade documents the need for, and obstacles to, competition in the navigation device market.

¹ *EchoStar Satellite LLC v. FCC*, 704 F.3d 992 (D.C. Cir 2013) (vacating an Order and Reconsideration Order over the imposition of encoding rules on direct broadcast satellite providers).

INCOMPAS also reiterated our previous assertion² that the Commission retains the jurisdiction necessary to ensure that the standard license governing the process for placing MVPD-supplied apps on a competitive device or widely-deployed platform does not contain terms and conditions that would allow MVPDs and programmers to discriminate against certain categories of devices or harm the functionality of these devices in any way. Strong provisions to protect and enforce the rights of competitive device manufacturers and widely deployed platforms to develop innovative solutions will be necessary if the Commission seeks to address the competitive concerns underlying Section 629. If these manufacturers are to be excluded from the standard license development process, Commission oversight is completely justified given the lack of competition in this particular market in the 20 years since this provision was enacted. Finally, we argued that, in response to pay-TV providers' app-based proposal for navigation device competition, the Commission's vast technical expertise must be relied upon to determine the widely-deployed platforms for which MVPDs must be required to create downloadable applications. Pay-TV providers should not be allowed to seek its preferred regulatory solution under Section 629 using apps and then reject the Commission's attempt to implement it in order to achieve the statutory goal of assuring competition in the navigation devices market and providing consumers with meaningful choice as intended by Congress.

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced docket. Please do not hesitate to contact me if you have questions about this submission.

Respectfully submitted,

/s/ Christopher L. Shipley

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cc: Marc Paul

² See Letter from Christopher L. Shipley, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (Sep. 28, 2016).